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No. 84-1019

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CARPENTERS' LOCAL UNION No. 1478
Petitioner,
VS.
NEAL STEVENS,
Respondent.

NEAL STEVENS,
Respondent
VS.
CARPENTERS' LOCAL UNION No. 1478;
SOUTHERN CALIFORNIA CONFERENCE
OF CARPENTERS,
Petitioners.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Are unit determinations irrelevant in cases involving construction industry prehire agreements?

(2) If unit determinations are relevant in such cases, can an arbitrator ignore or overrule a unit determination of the National Labor Relations Board?

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SOUTHERN CALIFORNIA CONFERENCE
OF CARPENTERS,
Petitioners.

BRIEF IN OPPOSITION

Respondent, Neal Stevens, prays that the petition for a writ of certiorari to review the decision issued on August 1, 1984 and modified on October 4, 1984, by the U. S. Court of Appeals for the Ninth Circuit be denied. The decision of the Court of Appeals is officially reported 743 F.2d 1271.

STATEMENT OF THE CASE

E.O.S. Enterprises, Inc. (hereinafter "E.O.S.") began business in 1975 and currently employs 30 employees. E.O.S. is wholly owned by Neal Stevens and his wife, Jean Stevens. No history of collective bargaining exists between the Carpenters Union and E.O.S. In 1977 E.O.S. desired to hire a superintendent who requested that E.O.S. pay union fringe benefits on his behalf. E.O.S. could not pay fringe benefits for this superintendent as E.O.S. did not have a contract with the Union. However, a business agent for Carpenters' Local 1140 arranged for Neal Stevens Contracting, a sole proprietorship, to enter into a prehire agreement with the Union. This arrangement also permitted Neal Stevens Contracting (hereinafter "NSC") to carry the superintendent on its payroll. As a result of this agreement, NSC executed a Union Memorandum Agreement on December 21, 1977, which incorporated the 1977 to 1980 Master Labor Agreement. In 1980, Stevens executed a second Memorandum Agreement incorporating the 1980-1983 Master Labor Agreement.

On March 2, 1982, the Union filed a grievance against NSC. On March 11, 1982, the Union sent a letter to Neal Stevens noting the pending arbitration regarding "the application of the Master Labor Agreement to E.O.S., a nonunion entity, which is failing to comply with the terms and conditions of the Master Labor Agreement." In this letter, the Union sought, pursuant to the National Labor Relations Act, information from Neal Stevens necessary to the arbitration proceeding.

On April 2, 1982, E.O.S. filed a petition with the National Labor Relations Board (hereinafter "Board") seeking an election among its carpentry employees in order to determine whether the employees desired representation by the Carpenters' Union. Issues of single employer or alter ego

status, and appropriate unit issues, were litigated in the Board proceedings. In directing an election, the Regional Director specifically found that E.O.S. and NSC were neither joint employers nor alter egos. The Regional Director additionally found that employees of NSC and E.O.S. did not constitute a single bargaining unit.

Despite the Board's determination, an arbitrator found a single employer/alter ego relationship between E.O.S. and NSC, and held that both entities were bound to the agreement. The Union sought enforcement of the award, pursuant to Section 301 of the Labor Management Relations Act [29 U.S.C. § 185(a)], (hereinafter "Act"), in district court, NSC filed a complaint under Section 301 to set aside the award. The district court confirmed the award on grounds not raised by the Union. The Court of Appeals then reversed the district court decision based on the supremacy of the Board determination that the employees of E.O.S. and NSC did not constitute a single bargaining unit.

REASONS FOR DENYING THE WRIT

SUMMARY OF THE ARGUMENT

The Court of Appeals based its decision on hornbook law, that a collective bargaining agreement cannot bind a non-signatory employer unless, *inter alia*, the employees of both employers constitute one bargaining unit. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976).

The bargaining unit determination is within the province of the Board. Once the Board makes a unit determination, its decision takes precedence over unit determination made in arbitration. *Carey v. Westinghouse*, 375 U.S. 273 (1964). Thus, in the present case, because the Board determined that E.O.S. and NSC's employees did not constitute a single

bargaining unit, the Court of Appeals correctly held that E.O.S. could not be bound to NSC's agreement.

Petitioner has continually sought to ignore the Board's unit determination and argues that this Court in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), in effect, ruled that unit determinations are not relevant in construction industry prehire agreements. To the contrary, this Court in *McNeff* continually spoke of "relevant units" throughout its decision. Furthermore, this Court in *McNeff* cited its earlier *Higdon* decision, which also made reference to relevant units in construction prehire agreements. Finally, this Court's landmark decision in the *Peter Kiewit* decision which dealt directly with appropriate unit issues, involved a construction industry "dual shop" case.

This Court in *McNeff* stated that the enforcement of prehire agreements does not affect the right of employees to select their bargaining representative. A unit determination was not directly in issue before the Court in *McNeff*. If petitioner's argument is granted, and unit determinations are irrelevant in prehire cases, then enforcement of prehire agreements could indeed preclude employees from choosing their bargaining representative. Where the Board designates separate bargaining units in an election proceeding, a grouping of employees are excluded from participating in the election. If a union could nevertheless ignore the unit determination and enforce an agreement over an expanded unit through its grievance arbitration proceedings, the contract could affect disenfranchised employees who would be powerless to negate the union's minority representation.

Additionally, petitioner's reliance on *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983) and *Metropolitan Detroit Bricklayers District Council, International Union of Bricklayers v. J. E. Hoetger & Co.*, 672 F.2d 580 (6th Cir. 1982) is misplaced. These cases involve factual and

procedural patterns which are distinctly dissimilar to the factual and procedural patterns in the present case. There is no split in the circuits. No circuit has enforced an agreement against a non-signatory in a dual shop case when the Board has determined that separate units exist.

ARGUMENT

I

CONTRARY TO PETITIONER'S POSITION, THIS COURT IN JIM McNEFF, INC. v. TODD, 461 U.S. 260 (1983) REINFORCED PRIOR DECISIONS OF THIS COURT THAT UNIT DETERMINATIONS ARE RELEVANT TO CASES INVOLVING CONSTRUCTION INDUSTRY PREHIRE AGREEMENTS.

In *Jim McNeff, Inc. v. Todd,* 461 U.S. 260 (1983), the employer executed a Section 8(f) agreement, a "prehire" agreement, with the union. The employer, however, failed to make the monthly trust fund payments required by the agreement. The union sought enforcement of the prehire contract terms through a Section 301 suit. The Court in *McNeff* held that a Section 301 suit was a proper manner of enforcing the terms of a prehire contract against a signatory to the contract. *Id.* at 271. In reaching the above conclusion, the Court also held that enforcement of a prehire contract pursuant to a Section 301 suit, "does not impair the rights of employees to select their own bargaining agent." *Id.* at 269. The facts of the instant case, however, clearly differ from those of *McNeff.* In the present case, unlike *McNeff,* the petitioner seeks to enforce a prehire contract against an entity which has not signed the prehire contract. Therefore, petitioner's characterization of the question presented as whether the Court of Appeals misinterpreted *McNeff* in reaching its decision is misleading.

There is no issue concerning "repudiation" or majority status in this case. No one is concerned with whether an election was held or who won any such election. The question concerns what grouping of employees are affected by the agreement, whether it be a prehire agreement or a traditional majority based agreement.

The issue is actually whether or not unit determinations are relevant in cases involving prehire agreements in the construction industry. Petitioner has continually sought to ignore the Board's unit determination that the carpentry employees of E.O.S. and the carpentry employees of NSC constitute separate units. This was the basis of the decisions by the court below. Such unit determinations have traditionally been labelled "representational" issues by both the National Labor Relations Board and this Court. By seizing on this Court's statement in *McNeff* that enforcement of prehire agreements does not infringe on the right of employees to select their own bargaining representative, petitioner attempts to blindly void all "representational" issues in construction industry agreements — including unit determination issues.

However, this Court's decision in *McNeff*, as well as this Court's decision in other construction industry cases, defeats petitioner's broad, simplistic argument. Even in *McNeff*, this Court acknowledged that unit determination issues exist in prehire agreement cases. This Court stated:

> Whatever may be required of a party wishing to exercise its undoubted right to repudiate a prehire agreement before the union attains majority support *in the relevant unit*, ...

Jim McNeff, Inc. v. Todd, 461 U.S. at 270 (Emphasis added).

This Court also stated:

> However, the monetary obligations of ... may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support *in the relevant unit.*

Id. 271-72 (Emphasis added).

Furthermore, this Court in *McNeff* cited its earlier decision in *NLRB v. Local 103, International Association of Bridge Workers (Higdon)*, 434 U.S. 335 (1978), which involved a construction industry prehire agreement, by stating:

> In accord with this intention, we approve the Board's conclusion that a 'prehire agreement is voidable' 'until and unless [the union] attains majority support *in the relevant unit.*'

Jim McNeff, Inc., 461 U.S. at 269 (quoting *Higdon*, 434 U.S. at 341) (Emphasis added).

Finally, as noted *infra*, this Court delivered the landmark decision requiring unit determinations in cases where a collective bargaining agreement of one entity is sought to be applied to another entity, in the case of *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1977). The *Peter Kiewit* decision was a construction industry case.

Clearly, petitioner's attempt to render meaningless unit determinations in construction industry prehire agreement cases, and to divest the authority of the National Labor Relations Board to make such determinations, is unwarranted.

II

THE NATIONAL LABOR RELATIONS BOARD'S DETERMINATION THAT NEAL STEVENS CONTRACTING AND E.O.S. DO NOT HAVE THE SAME BARGAINING UNIT PRECLUDES E.O.S. FROM BEING BOUND TO NEAL STEVENS CONTRACTOR'S PREHIRE AGREEMENT.

In *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers (Peter Kiewit)*, 425 U.S. 800 (1976), the union contended that South Prairie violated Sections 8(a)(5) and (1) of the National Labor Relations Act by refusing to apply Peter Kiewit's collective-bargaining agreement to its, South Prairie's, employees.

Initially, the National Labor Relations Board (hereinafter "Board"), concluded that South Prairie and Kiewit were separate employers; therefore, the Board dismissed the union's complaint. On review, the Court of Appeals for the District of Columbia held that Kiewit and South Prairie were a single employer. The Court of Appeals then concluded that the agreement therefore bound both companies. By making this decision the Court of Appeals, by implication, concluded that the employees of Kiewit and South Prairie constituted a single, over-all appropriate unit under Section 9 of the Act for purposes of collective bargaining. In reviewing the Court of Appeals' decision, this Court concluded that the Court of Appeals' determination with respect to the bargaining unit issue constituted error. This Court held that such unit determinations must first be decided by the Board. Therefore, *Peter Kiewit* not only stands for the proposition that determination of a bargaining unit is within the Board's province, but also stands for the proposition that a non-signatory cannot be bound to an agreement unless there is a

finding that (1) both employers constitute a single employer, joint employer or alter ego, and (2) one overall bargaining unit is appropriate for both employers.

The Ninth Circuit adopted the *Peter Kiewit* test in Section 301 litigation in *Local 3-193 v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980). In *Teamsters, Local 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982), the Ninth Circuit reaffirmed its holding in *Ketchikan* stating:

> [T]hat two companies have been designated a single employer . . . is not determinative as to whether both are bound by a union contract signed by one of them. This requires that the employees of each constitute a single bargaining unit.

California Consolidators, Inc., 693 F.2d at 83 (quoting *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 386 (9th Cir. 1979)).

Thus, clearly before E.O.S. can be bound to NSC's prehire agreement E.O.S. and NSC must both constitute a single employer and/or alter ego and their employees must constitute a single bargaining unit. The Regional Director, however, in directing an election among the carpentry employees of E.O.S., made a specific finding that E.O.S. and NSC were separate employers and that the carpentry employees of E.O.S. were a distinct and "separate bargaining unit" from NSC's employees.

A. The Board Determination With Respect to a Bargaining Unit Takes Precedence Over the Arbitrator's Finding.

In *Carey v. Westinghouse*, 375 U.S. 261 (1964), the Court stated:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the con-

> troversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accordance with that ruling it would not be liable for damages under § 301.

Id. at 272.

First of all, in holding that E.O.S. was bound to NSC's bargaining agreement, the arbitrator, by necessary implication, determined that E.O.S. and NSC's employees constituted one unit. The District of Columbia circuit made the same implied finding in the *Peter Kiewit* decision when it applied an agreement to a non-signatory based on its decision that two entities constituted a single employer.

As stated earlier, the Regional Director, in addition to finding that no single employer or alter ego relationship existed, found that the employees of these two entities were not in a single unit. Thus, the arbitrator's decision and the Board's decision are patently inconsistent. Therefore, pursuant to *Carey v. Westinghouse*, the Board decision with respect to the unit determination takes precedence over the arbitrator's.

B. No Conflict Exists Among the Circuits With Respect to the Board's Supremacy in Making Unit Determinations.

As this Court stated in *Peter Kiewit:*

> [T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final is rarely to be disturbed. . . .'

Peter Kiewit, 425 U.S. at 805 (quoting *Packard Motor Company v. NLRB*, 330 U.S. 485, 491 (1947)).

The circuits have consistently followed the above edict announced in *Peter Kiewit* in Section 301 actions. The

court below in *Local 3-193, International Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) stated:

> This declaration of the strong policy of judicial deference to initial determination by the NLRB of representation issues is equally applicable to actions under Section 301. In the present case the Union is attempting an end-run around Section 9 of the Act and under the guise of contract interpretation wants to avoid . . . determination of an appropriate bargaining unit by the NLRB, which has primary authority in this area. This cannot be countenanced.

Id. at 1299-1300.

The issues of the present case are strikingly analogous to those of *Ketchikan*. In the instant case, the Board decided that the employees of the two employers were not a single unit. The Union then "attempted an end-run" around the Board's determination by adjudicating this issue in the arbitration forum. An attempt to avoid the Board's authority could not be countenanced in *Ketchikan*, and it cannot be countenanced in the present case.

Furthermore, in *Teamsters, Local 70 v. California Consolidators*, the court stated:

> [T]hat two companies have been designated a single employer . . . is not determinative as to whether both are bound by a union contract signed by one of them. This requires that the employees of each constitute a single bargaining unit.

Id. at 83 (quoting *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 386 (1979)).

There is a split in the circuits which is not germane to this matter. The Ninth Circuit, in *Ketchikan* and *California Consolidators*, has held that in cases originating before

the district court in Section 301 litigation, the district court cannot make a determination that two entities are bound to a single agreement because this would invade the Board's province of making unit determinations. The Fifth Circuit, in *Carpenters, Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), held that in such district court litigation under Section 301, the district court was empowered, in the absence of a Board determination, to make a unit determination. However, even here, the Fifth Circuit noted that its decision would be different if the Board had previously made the unit determination.

In *Pratt-Farnsworth*, no party had sought certification or clarification of the relevant bargaining unit before the Board. *Id.* at 515. The Court of Appeals stated that if either of the parties had sought Board review of the unit determination issue, "our view of the proper role of the federal district court in that case might be very different." *Id.* at 515. The court also stated:

> We do not deny that deference to the expertise of the Board in unit determinations should be encouraged whenever possible, and upon the initiation of clarification proceedings or the filing of an unfair labor practice by one of the parties to the this action, depending upon how far these proceedings had progressed, the wisest course for the district court might well be to stay the action pending the Board's resolution of the unit issue.

Id. at 515.

Therefore, both the Ninth Circuit and the Fifth Circuit agree that unit determinations are relevant and that Board determinations on such issues are paramount.

In the instant case, there has been a Board unit determination. There has never been any decision by any court

of appeals binding two entities to one agreement when there exists an adverse Board unit determination. There is simply no split in the circuits relevant to this case.

III

PETITIONER IS PRECLUDED FROM USING ARBITRATION IN A SECTION 301 ACTION TO REVIEW THE UNIT DETERMINATION ISSUE AS IT FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

After the Regional Director determined that E.O.S. and NSC's employees did not constitute a single unit, petitioner failed to file a request for review of this issue. In *Local 1547 v. Local 959*, 507 F.2d 872 (9th Cir. 1974), the Ninth Circuit recognized that when a union does not request review of a Regional Director's decision pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8 as amended, it cannot attack the findings at a later time. *Id.* at 874-75. Therefore, since the Union failed to request review on the relevant issues the arbitrator's unit determination and the resulting Section 301 action should not be permitted.

IV

THIS COURT IN JIM McNEFF, INC. v. TODD, DID NOT RENDER UNIT DETERMINATIONS AND OTHER "REPRESENTATIONAL" ISSUES IRRELEVANT IN PREHIRE AGREEMENTS.

This Court, in *McNeff*, held that the enforcement of a prehire agreement against the signatory employer did not inhibit the right of employees to determine their representative status with the union. They are still free to petition the Labor Board at any time pursuant to the proviso to Section 8(f). The employer is also free to repudiate the agreement at any time prior to the union ob-

taining majority status in a permanent and stable unit. Petitioner in this case is attempting to expand this rationale to prohibit any issue concerning "representation" matters from being heard in cases involving prehire agreements. The logic of petitioner is that unit determinations are labelled "representational" and therefore should not be considered in prehire agreements which are, according to petitioner, not "representational." Petitioner's argument is, therefore, based on terminology rather than substance.

It should be noted that petitioner is distorting the use of the general term "representational." Representational issues, decided by the Board involve a wide variety of issues, including the actual casting of ballots in a Board election.

It should be noted in this case that we are not concerned with who won or who did not win a Board election. What is in issue is the unit determination made in that "representation" proceeding. It should also be noted, that the Board makes unit determinations even in cases where there will be no election or casting of ballots. Even in such cases, unit determinations are broadly labelled "representational" issues.

For example, this case first arose before the Regional Director on a "representation" petition seeking an election. However, such issues also arise before the Board in "unit determination" petitions. Both of these types of petitions arise under Section 9 of the National Labor Relations Act and cover issues which are broadly referred to as "representational." Indeed, Section 9 is entitled "Representatives and Elections," and under Section 9(b) the Board has authority to determine "the unit appropriate for the purposes of collective bargaining. . . ."

When petitions are filed seeking an election, the Board requires a "question concerning representation." However,

under Section 102.60(b) of the Board's Rules and Regulations, Series 8 as amended, the Board provides:

> A petition for clarification of an existing bargaining unit or a petition for amendment of certification, *in the absence of a question concerning representation,* may be filed by a labor organization or by an employer.

Therefore, unit determinations can be made even in the absence of a question concerning representation. In such a unit determination petition, an election will not be directed. Nevertheless, this Court, in *Peter Kiewit,* and the Board, have broadly labelled unit determinations as representational.

Petitioner's cry that it is not seeking "representation" is therefore irrelevant. The underlying unit determination is nevertheless controlling, regardless of its topical labeling.

Furthermore, unit determinations are relevant in Section 8(f) cases because they can affect the grouping of employees that are affected by a union's contract and the union's representation through the contract. A signatory union is a representative of the employees of the employer, whether it be a majority representative or a Section 8(f) minority representative. A unit determination is necessary to see which employees are affected by such representation and the agreement. In *Los Angeles Bldg. & Constr. Trades Council (Donald Schriver, Inc.),* 239 NLRB 264, *aff'd,* 635 F.2d 859 (CA DC 1980), *cert. denied,* 451 U.S. 976 (1981), the Board stated:

> An 8(f) collective-bargaining relationship may be more vulnerable to disruption than a 9(a) relationship because inquiry may be made into the union's majority status during the term of the contract. Nevertheless, under an existing 8(f) relationship, the union party to the 8(f) contract is the lawful representative of the employees covered by the contract. As their represen-

> tative such union has an interest in restricting subcontracting in order to protect continuity of work and fringe benefits for the employees and to insure more stable and harmonious jobsite relations to the same extent a 9(a) representative has.

Donald Schriver, Inc., 239 NLRB at 270.

It should be noted that if Board unit determinations can be ignored in prehire agreements, various employees which could be affected by the agreement could actually be precluded from voting on the status of the union. For example, if the Board determines separate units are appropriate in an 8(f) case, a group of employees would be precluded from voting. These same employees may not want to be governed by the 8(f) agreement and seek to insure such an agreement ceases to exist. Nevertheless, despite the unit determination and their disenfranchisement, the union could continue to apply the agreement to the employees through the union's internal grievance procedures if petitioner's argument is adopted.

V

PETITIONER'S CLAIM OF A CONFLICT IN THE CIRCUITS IS INCORRECT.

In *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), the employers sought to collaterally estop the Board from making a single employer determination as the district court, in an earlier proceeding, had found that the two employers was not alter egos. *Id.* at 23. The Court of Appeals concluded that the Board could not be precluded from making the single employer decision as in the Board proceeding — §§ 8(a)(5) and (a)(1) charges — the question was whether the employers were a single employer, whereas, in the Section 301 contract action the question was whether the employers were alter egos. Thus, the two proceedings

lacked sufficient identity of issues to invoke collateral estoppel.

In *Metropolitan Detroit Bricklayers District Council, Int'l. Union of Bricklayers v. J. E. Hoetger & Co.*, 672 F.2d 580 (6th Cir. 1982), cited by petitioner, general contractor Hoetger subcontracted masonry work to Hawkins. The subcontracting provision required (1) that Hawkins employ only workers affiliated with the union, and (2) that Hawkins assume exclusive liability for paying all benefits. Hawkins failed to pay the fringe benefits, and then went out of business. The union picketed Hoetger. Consequently, Hoetger filed Section 8(b)(4)(i) and (ii)(B), 29 U.S.C. § 158(b)(4)(i) and (ii)(B) (1976), secondary boycott unfair labor practice charges against the union. The Board ruled that the union had not violated the above sections, because Hoetger and Hawkins were joint employers within the meaning of the secondary boycott provisions of the Act.

Next, the union brought a Section 301 action alleging that Hoetger and Hawkins comprised a single employer, and that the employers violated the collective bargaining agreement. The union sought collateral estoppel of the Board's joint employer finding in the unfair labor practice secondary boycott proceeding. The Court of Appeals refused to invoke collateral estoppel because the issues before the two forums were not the same.

The court based its decision on the premise that the joint employer resolution in a secondary boycott matter is different than a joint employer resolution in a "dual shop" case.

However, the instant case, unlike *Hoetger* involves a unit determination by the Regional Director. Furthermore, a unit determination is a necessary element in both proceedings. As stated previously, unit determinations are within the province of the Board. Thus, once the Board resolves the unit determination issue, the Board's finding must take

precedent over an arbitrator's determination. Therefore, unlike *Hoetger*, one of the common issues in each case is the same. And, unlike *Hoetger*, this Court and the circuits are in unanimous agreement that unit determinations are best decided by the Board in Section 9 proceedings.

VI

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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